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Direct Corporation and Meetu Magic, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STAR FABRICS, INC., a California
Corporation,

Plaintiff,

vs.

BURLINGTON COAT FACTORY
DIRECT CORPORATION, a Delaware
Corporation; MEETU MAGIC, INC., a
New York Corporation; and DOES 1
through 10,

Defendants.

Case No. 2:16-cv-02685-PA (FFMx)

**DEFENDANTS' NOTICE OF
MOTION, MOTION TO DISMISS
FOR FAILURE TO PROSECUTE
AND MOTION FOR SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: March 13, 2017

Time: 1:30 p.m.

Crtrm: 9A

Complaint Filed: April 19, 2016

Trial Date: April 18, 2017

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	3
II. FACTUAL BACKGROUND	4
III. LEGAL STANDARD	7
A. Dismissal for Failure to Prosecute is Proper where Plaintiff Cannot Demonstrate with Evidence that a Trier of Fact should Find in its Favor.....	7
B. Summary Judgment is Proper Where No Evidence Supports the Nonmoving Party’s Claims.	8
C. Evidence Not Produced in Discovery is Inadmissible.	10
IV. DISCUSSION	10
A. Legal Standard Governing Copyright Infringement Claims	10
B. Plaintiff Cannot Meet its Burden of Proof.	11
1. Plaintiff failed to provide evidence that it is the author or owner of the Subject Design during the discovery period.....	12
2. Plaintiff has provided no evidence that the Defendants had access to the Subject Design.	13
3. Denying this motion would prejudice Defendants.	15
V. CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

<i>Ash v. Cvetkov,</i>	
739 F.2d 493 (9th Cir. 1984).....	7
<i>Beyene v. Coleman Sec. Servs., Inc.,</i>	
854 F.2d 1179 (9th Cir.1988)	10
<i>Celotex Corp. v. Catrett,</i>	
477 U.S. (1986).....	7, 8, 11
<i>Feist Publications, Inc. v. Rural Tel. Serv. Co.,</i>	
499 U.S. 340 (1991).....	10
<i>Giddings v. Vision House Production, Inc.,</i>	
584 F.Supp.2d 1222 (D. Ariz. 2008)	10
<i>Henderson v. Duncan,</i>	
779 F.2d 1421 (9th Cir. 1986)	7
<i>Hernandez v. Spacelabs Med. Inc.,</i>	
343 F.3d 1107 (9th Cir.2003)	7
<i>Hoffman v. Constr. Protective Servs., Inc.,</i>	
541 F.3d 1175 (9th Cir.2008)	8, 10
<i>In re Oracle Corp. Sec. Litig.,</i>	
627 F.3d 376 (9th Cir. 2010).....	9
<i>Intel Corp. v. Hartford Accident & Indem. Co.,</i>	
952 F.2d 1551 (9th Cir.1991)	7
<i>James River Ins. Co. v. Herbert Schenk, P.C.,</i>	
523 F.3d 915 (9th Cir.2008).....	7
<i>Jason v. Fonda,</i>	
698 F.2d 966 (9th Cir.1982).....	11

TABLE OF AUTHORITIES (con't)

Page(s)

<i>Lewis v. Casey</i> ,	
518 U.S. 343 (1996).....	10
<i>Narell v. Freeman</i> ,	
872 F.2d 907 (9th Cir.1989).....	11
<i>Nealey v. Transportation Maritima Mexicana, S.A.</i> ,	
662 F.2d (9th Cir. 1980).....	7
<i>Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.</i> ,	
210 F.3d 1099 (9th Cir.2000)	7
<i>Orr v. Bank of Am., NT & SA</i> ,	
285 F.3d 764 (9th Cir.2002).....	10, 12
<i>Ortiz–Lopez v. Sociedad Espanola de Auxilio Mutuo Y Beneficiencia de Puerto Rico</i> ,	
248 F.3d 29 (1st Cir.2001).....	8
<i>R & R Sails, Inc. v. Ins. Co. of Penn.</i> ,	
673 F.3d 1240 (9th Cir.2012)	8
<i>Soremekun v. Thrifty Payless, Inc.</i> ,	
509 F.3d 978 (9th Cir. 2007).....	7
<i>Three Boys Music Corp. v. Bolton</i> ,	
212 F.3d 477 (9th Cir. 2000).....	11
<i>Torres v. City of L.A.</i> ,	
548 F.3d 1197 (9th Cir.2008)	8
<i>Triton Energy Corp. v. Square D Co.</i> ,	
68 F.3d 1216 (9th Cir.1995).....	8
<i>United Fabrics Int’l, Inc. v. C&J Wear, Inc.</i> ,	
630 F.3d 1255 (9th Cir. 2011)	12
<i>Yeti by Molly Ltd. v. Deckers Outdoor Corp.</i> ,	
259 F.3d 1101 (9th Cir.2001)	8, 10

TABLE OF AUTHORITIES (con't)

Page(s)

FEDERAL STATUTES

17 U.S.C. § 501(b)10

FEDERAL RULES

Fed.R.Civ.P. 378, 10

Fed. R. Civ. P. 56(a).....8, 11

Fed.R.Civ.P. 56(e).....10

OTHER AUTHORITIES

Ninth Circuit Model Jury Instructions 17.412

Ninth Circuit Model Jury Instructions 17.1613

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on March 13, 2017, at 1:30 p.m. or as soon thereafter as the matter may be heard in the above-entitled court, before the Honorable Percy Anderson, in Courtroom 9A, located at 350 W. 1st Street, Los Angeles, California 90012, Defendants Burlington Coat Factory Direct Corporation and Meetu Magic, Inc., (collectively “Defendants”) will and hereby do move the Court, pursuant to Federal Rules of Civil Procedure 56, for summary judgment as to Plaintiff Star Fabrics, Inc.’s (“Star Fabrics” or “Plaintiff”) Complaint and motion to dismiss for failure to prosecute.

GROUND FOR MOTION: This motion is made on the grounds that Plaintiff has failed to comply with the Copyright Act and has failed to prove infringement as a matter of law. Therefore, Plaintiff does not have a valid copyright, cannot prove copying, and has no standing to bring this alleged infringement action.

Plaintiff has failed to comply with the statutory registration requirements that apply to a collective work. Accordingly, Plaintiff does not have a valid copyright registration for the works it claims were infringed.

Additionally, Plaintiff has failed to apply for copyright registration of the purported “Subject Designs.” As a result, JC Penney cannot be held liable for copyright infringement.

BASIS OF MOTION: This motion is based on this Notice of Motion and Motion, the Points and Authorities submitted herein, the declarations submitted concurrently with this Motion, and such further arguments and papers that may be presented to the Court before or during the hearing.

MEET AND CONFER CERTIFICATION: Prior to the filing of this Motion, counsel for Defendants fully met and conferred with counsel for Plaintiff regarding this Motion. Counsel for both parties agreed to file the respective Motions for Summary Judgment/Summary Adjudication on February 13, 2017 – for a hearing date on March 13, 2017. Plaintiff’s counsel violated the agreement by filing Plaintiff’s Motion for

1 Summary Adjudication one week earlier, and noticing a hearing date of March 13,
2 2017. As Plaintiff's counsel has breached the agreement, Defendants request that the
3 Court enforce the parties' agreement and set both motions for hearing on the same day,
4 March 13, 2017.

5
6 Dated: February 13, 2017

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A Professional Corporation
John T. Egley
Scott P. Shaw
W. Christopher Dalton

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10 By: /s/ W. Christopher Dalton
W. Christopher Dalton

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12 Attorneys for Defendants Burlington Coat
Factory Direct Corporation and Meetu Magic,
13 Inc.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This action cannot proceed. Plaintiff Star Fabrics, Inc. alleges copyright
4 infringement, but it failed to provide evidence supporting the central elements of its
5 claim. Defendants requested documents and information in written discovery to
6 determine the basis for Plaintiff's assertions that it owns the design at issue (the
7 "Subject Design"), that it holds a valid registration for the Subject Design, that
8 Defendants had access to and copied the Subject Design, that the Subject Design is
9 substantially similar to the allegedly infringing garments, and that Plaintiff suffered
10 damages from the alleged infringement. Plaintiff bears the burden to prove all of these
11 elements, but it produced no documents during discovery as evidence for any of them.
12 Defendants also sought to take the deposition of Plaintiff's person most knowledgeable
13 about the key issues in the case, but again, Plaintiff cancelled the deposition and never
14 produced a witness to testify, thereby providing no testimonial evidence for its claims.

15 The federal rules prohibit a party from introducing any evidence at trial that it
16 failed to produce in discovery. Because Plaintiff produced no evidence in discovery,
17 and since the Court at the summary judgment stage may only consider evidence that is
18 admissible at trial, Plaintiff can produce no evidence at this stage to prove that there is a
19 dispute of material fact requiring summary judgment to be denied.

20 This is a case filed by a copyright troll whose business is premised on filing
21 baseless infringement claims and pressuring defendants to settle in order to avoid the
22 high costs and business losses incurred during lengthy litigation. As Plaintiff's failure
23 to provide any evidence supporting its claims shows, the case has no merit. Plaintiff
24 has failed to provide any evidence as proof of infringement as a matter of law, and
25 summary judgment should therefore be granted.

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II. FACTUAL BACKGROUND

In 2010, Defendant Meetu Magic obtained a design from Datta Arts Design Studio in India; the design is titled “DR06-Q DATTA ARTS DESIGN STUDIO.” (Declaration of Gurdev Singh (“Singh Decl.”) ¶ 2.) Meetu later adapted the DR06-Q design and had it printed on a dress to be sold to retailers. (Singh Decl. ¶ 3.) Meetu obtained a copyright for the design in December 2014, under Registration Number VAU 1-249-714. (Singh Decl. ¶ 4, Exhibit 1.) An image of the dress bearing the DR06-Q design is below:

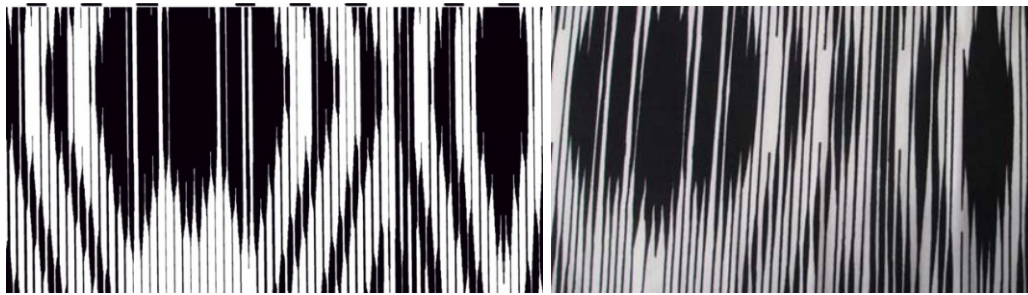


DATTA ARTS
DESIGN STUDIO

STYLE # DR06-Q

(Singh Decl. ¶ 4.)

Plaintiff Star Fabrics filed its Complaint in this matter alleging that it owns an original design entitled Design No. 62634 (the “Subject Design”), that the Subject Design has been registered with the United States Copyright Office, and that Defendants have infringed the Subject Design. In support of its infringement claim, Star Fabrics included in its Complaint only the following images:

“Subject Design”Allegedly Infringing Design

On November 16, 2016, Defendants served discovery requests asking Plaintiff to provide all documents and information supporting its claims. More specifically, Defendants requested, for example, all documents and information relating to the creation of the Subject Design, relating to Plaintiff’s effort to register the copyright for the Subject Design, relating to the transfer of the Subject Design’s (or related source artwork’s) copyright(s), and supporting Plaintiff’s claim for monetary relief. (Declaration of W. Christopher Dalton (“Dalton Decl.”) ¶ 6, Ex. 1.)

Plaintiff responded on December 16, 2016, stating that it “has and will conduct a reasonable investigation and produce all discovered nonprivileged responsive documents in its possession, custody, or control” for each of Defendants’ requests. (Dalton Decl. ¶ 7, Ex. 2.) No documents were produced at the time the responses were served or at any time during the discovery period.

Moreover, Defendants on January 20, 2017 noticed the deposition of Plaintiff’s person most qualified to testify regarding the central elements of Plaintiff’s infringement claim in order to obtain testimonial evidence regarding Plaintiff’s allegations of infringement. The deposition was to be held on January 30. (Dalton Decl. ¶ 8, Ex. 3.) But on Friday January 27, the last business day before the deposition was to be taken, Plaintiff cancelled the deposition. Defense counsel requested alternative dates for the deposition, which Plaintiff’s counsel said he would provide. (Dalton Decl. ¶ 9.) But Plaintiff’s counsel failed to provide an alternative date for the deposition, and discovery is now closed. (*Id.*)

Also on January 27, Defendants' counsel met and conferred with Plaintiff's counsel to request the documents that Plaintiff stated in its discovery responses would be produced. Plaintiff's counsel stated that the requested documents would be produced by close of business on January 31, 2017. (Dalton Decl. ¶ 10, Ex. 4.) But again, Plaintiff failed to provide any documents during the discovery period. (Dalton Decl. ¶ 11.) Plaintiff has thus deprived Defendants the opportunity to obtain and review both the documents and the testimony Defendants have requested, rendering Defendants incapable of mounting a proper defense to Plaintiff's claims.

Plaintiff provided only a series of images of a dress that it says bear the Subject Design. One such photograph is below, on the left. The image on the right is, again, Meetu Magic's image of the allegedly infringing dress bearing Meetu Magic's adaptation of the DR06-Q design, which Plaintiff alleges infringes the Subject Design.

"Subject Design"



Allegedly Infringing Design



As these images demonstrate, although the two designs contain similar elements, the arrangement of those elements is significantly different. And because the DR06-Q design was obtained from India, Meetu had no reason to believe that a United States copyright existed for the print design on its garment at the time it purchased the design.

III. LEGAL STANDARD

A. Dismissal for Failure to Prosecute is Proper where Plaintiff Cannot Demonstrate with Evidence that a Trier of Fact should Find in its Favor.

The Court has authority to dismiss for lack of prosecution due to Plaintiff's repeated failures to comply with the FRCP, Local Rules, and unreasonable delay. *See, e.g., Henderson v. Duncan*, 779 F.2d 1421 (9th Cir. 1986) (dismissal for lack of prosecution due to failure to comply with local rule); *Nealey v. Transportation Maritima Mexicana, S.A.*, 662 F.2d 1280 (9th Cir. 1980) (unreasonable delay creates injury to the defense and is grounds for dismissal for lack of prosecution); *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984) (court has inherent power to dismiss for lack of prosecution).

Moreover, the Court can dismiss and enter judgment where the moving party cannot affirmatively demonstrate with evidence that a reasonable trier of fact could find in favor of the movant. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Where the moving party establishes the absence of evidence, the Court should enter judgment in favor of the moving party. *See James River Ins. Co. v. Herbert Schenk, P.C.*, 523 F.3d 915, 923 (9th Cir.2008); *Soremekun*, 509 F.3d at 984 (citing *Celotex Corp. v. Catrett*, 477 U.S. at 323 (1986)). *See also Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir.2000). The nonmoving party cannot rely merely on allegations in the Complaint. *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir.2003). The nonmoving party must present significant and probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident &*

1 *Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir.1991). “The mere existence of a scintilla of
2 evidence in support of the non-moving party’s position is not sufficient[]” to defeat
3 summary judgment. *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th
4 Cir.1995).

5 Here, Plaintiff failed to produce any evidence during discovery, and under Rule
6 37(c)(1), Plaintiff is precluded from relying on evidence that was not “properly
7 disclosed.” *R & R Sails, Inc. v. Ins. Co. of Penn.*, 673 F.3d 1240, 1246 (9th Cir.2012)
8 (quoting *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir.2008)
9 (quoting *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th
10 Cir.2001))). Rule 37 sanctions are “‘self-executing,’ ‘automatic[,]’” and designed to
11 “provide[] a strong inducement for disclosure of material[.]” *Yeti by Molly, Ltd.*, 259
12 F.3d at 1106 (quoting Fed.R.Civ.P. 37 advisory committees note to the 1993
13 amendments (hereinafter “1993 advisory committee’s note”)). The party facing
14 sanctions bears the burden of proving its failure to disclose the required information
15 was substantially justified or is harmless. *R & R Sails, Inc.*, 673 F.3d at 1246 (citing
16 *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir.2008)). “Courts have upheld the use
17 of the sanction even when a litigant’s entire cause of action or defense has been
18 precluded.” *Yeti by Molly*, 259 F.3d at 1106 (citing *Ortiz-Lopez v. Sociedad Espanola*
19 *de Auxilio Mutuo Y Beneficiencia de Puerto Rico*, 248 F.3d 29, 35 (1st Cir.2001)).

20 **B. Summary Judgment is Proper Where No Evidence Supports the**
21 **Nonmoving Party’s Claims.**

22 A party may move for summary judgment on any claim or defense in an action,
23 and is entitled to summary judgment if the movant is entitled to judgment based on the
24 facts where there is no genuine issue of dispute. *See* Fed. R. Civ. P. 56(a). On an issue
25 where the nonmoving party will bear the burden of proof at trial, the moving party can
26 prevail merely by pointing out to the district court that there is an absence of evidence
27 to support the opposing party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25
28

1 (1986). The Ninth Circuit has consistently applied this rule, stating that on a motion for
2 summary judgment

3 [w]here the non-moving party bears the burden of proof at trial, the moving
4 party need only prove there is an absence of evidence to support the non-
5 moving party's case. Where the moving party meets that burden, the burden
6 then shifts to the non-moving party to designate specific facts demonstrating
7 the existence of genuine issues for trial. This burden is not a light one. The
8 non-moving party must show more than the mere existence of a scintilla of
9 evidence. The non-moving party must do more than show that there is some
10 metaphysical doubt as to the material facts at issue. In fact, the non-moving
11 party must come forth with evidence from which a jury could reasonably
12 render a verdict in the non-moving party's favor. In determining whether a
13 jury could reasonably render a verdict in the non-moving party's favor, all
14 justifiable inferences are to be drawn in its favor.

15 *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (internal
16 quotation marks and citations omitted).

1 **C. Evidence Not Produced in Discovery is Inadmissible.**

2 A trial court can only consider admissible evidence in ruling on a motion for
3 summary judgment. See Fed.R.Civ.P. 56(e); *Orr v. Bank of Am., NT & SA*, 285 F.3d
4 764, 773 (9th Cir.2002); *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th
5 Cir.1988).

6 Rule 37(c)(1) forbids the use at trial of any information required to be disclosed
7 by Rule 26(a) that was is not properly disclosed during discovery. *Hoffman*, 541 F.3d at
8 1179 (citing *Yeti by Molly, Ltd.*, 259 F.3d at 1106 (“A party that without substantial
9 justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to
10 amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such
11 failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion
12 any witness or information not so disclosed.” Fed.R.Civ.P. 37(c)(1))).

13
14 **IV. DISCUSSION**

15 **A. Legal Standard Governing Copyright Infringement Claims**

16 To support a copyright infringement claim, a plaintiff must prove two elements:
17 “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work
18 that are original.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361
19 (1991).

20 A plaintiff must prove that it owned a valid copyright to the design at issue at the
21 time the alleged infringement took place. See 17 U.S.C. § 501(b); *Giddings v. Vision*
22 *House Production, Inc.*, 584 F.Supp.2d 1222, 1228-29 (D. Ariz. 2008). A plaintiff that
23 fails to prove that it owned a valid copyright at the time of the alleged infringement has
24 failed to prove that it has standing to sue. *Id.* at 1229. Standing is a jurisdictional
25 requirement, and a court must dismiss an action for lack of subject matter jurisdiction if
26 it determines the plaintiff lacks standing. *Id.*; *Lewis v. Casey*, 518 U.S. 343, 349 n. 1
27 (1996).
28

1 Proof of copying requires evidence that (1) the alleged infringer had access to the
 2 protected work before creating the accused work and (2) a substantial similarity of
 3 expression exists between the protected and accused works. *Narell v. Freeman*, 872
 4 F.2d 907, 910 (9th Cir.1989). Plaintiffs rarely possess evidence of direct “copying” so
 5 the courts allow plaintiffs to prove copying by showing that the defendant had access,
 6 and by showing that the two designs are substantially similar. *See Three Boys Music*
 7 *Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000), *cert. denied*, 531 U.S. 1126 (2000)
 8 (“Absent direct evidence of copying, proof of infringement involves fact-based
 9 showings that the defendant had ‘access’ to the plaintiff’s work and that the two works
 10 are ‘substantially similar.’”).

11 The term “access” is defined as “an opportunity to view or copy plaintiff’s work.”
 12 *Id.* at 482. In order to show access, Plaintiff must *prove* that Defendant had such an
 13 opportunity. *Id.* at 483-84. A bare possibility of access is insufficient to sustain a
 14 copyright infringement claim. *Jason v. Fonda*, 698 F.2d 966, 967 (9th Cir.1982).

15 **B. Plaintiff Cannot Meet its Burden of Proof.**

16 Because Plaintiff has produced neither documents nor testimony evidence
 17 supporting the central elements of its infringement claim, no such evidence is
 18 admissible, and the case should be dismissed for failure to prosecute, and/or summary
 19 judgment should be granted. *Celotex*, 477 U.S. at 322-23 (“[The] plain language of
 20 Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery
 21 and upon motion, against a party who fails to make a showing sufficient to establish the
 22 existence of an element essential to that party’s case, and on which that party will bear
 23 the burden of proof at trial. In such a situation, there can be ‘no genuine issue as to any
 24 material fact,’ since a complete failure of proof concerning an essential element of the
 25 nonmoving party’s case necessarily renders all other facts immaterial. The moving
 26 party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has
 27 failed to make a sufficient showing on an essential element of her case with respect to
 28 which she has the burden of proof.” (Emphasis added.)).

1. Plaintiff failed to provide evidence that it is the author or owner of the Subject Design during the discovery period.

In order to prevail on its claims of copyright infringement, Star Fabrics must establish both that it owns a valid copyright for the Subject Design and that Meetu Magic copied this work. Ninth Circuit Model Jury Instructions 17.4.

With respect to the first element, Star Fabrics has failed to produce any evidence that it owns a valid copyright. Plaintiff's counsel has, in similar cases in the past, included in the complaint the registration number and effective date of the relevant design's copyright registration. (Dalton Decl. ¶ 4.) Not so here. The Complaint merely states: "Plaintiff owns an original two-dimensional artwork used for purposes of textile printing entitled 62634 ('Subject Design') which has been registered with the United States Copyright Office." (Compl. ¶ 9.) And despite stating in its discovery responses that documents relating to the Subject Design's registration would be forthcoming, Plaintiff failed to produce any such documents during the discovery period.

"To rebut the presumption [of validity], an infringement defendant must simply offer some evidence or proof to dispute or deny the plaintiff's prima facie case of infringement." *United Fabrics Int'l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011). Here, the only party showing evidence of a valid copyright is Meetu Magic. (Singh Decl. ¶ 4, Exhibit 1.) Its registration certificate demonstrates that the DR06-Q design was authored by Datta Art Design Studio and has been registered by Meetu Magic, Inc. Plaintiff made no such showing with respect to the Subject Design. Plaintiff did not disclose any evidence to support its allegation that the work is original, or that it was created by a Star Fabrics employee.

Having failed to provide evidence during discovery to prove that it owns a valid copyright, Plaintiff will have no admissible evidence to offer at trial, and it cannot prove its case. *Orr*, 285 F.3d at 773. Summary judgment should be granted.

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2. Plaintiff has provided no evidence that the Defendants had access to the Subject Design.

With respect to the second element, copying may be shown either by direct evidence, or by proof that: (1) the author of the accused design had access to Plaintiff's copyrighted work, and (2) the works are substantially similar. Ninth Circuit Model Jury Instructions 17.16. Plaintiff has not produced any direct evidence of copying, Defendants' access to the Subject Design, or substantial similarity.

Access is defined as "a reasonable opportunity to view, read, hear, or copy the plaintiff's work before the defendant's work was created." *Id.* 17.17. Access can be shown in three ways: (1) by proving "a chain of events connecting the plaintiff's work and the defendant's opportunity to view, hear, or copy that work such as dealings through a third party (such as a publisher or record company) that had access to the plaintiff's work and with whom both the plaintiff and the defendant were dealing," (2) "the plaintiff's work being widely disseminated," or (3) "a similarity between the plaintiff's work and the defendant's work that is so 'striking' that it is highly likely the works were not created independent of one another." *Id.* 17.17 Supplemental Instruction.

Plaintiff has provided no evidence relating to Defendants' access to its copyrighted work. And even if it is able to provide such evidence, images of the designs and garments at issue show the designs are not "substantially similar," but are instead vastly dissimilar. The designs themselves, even without documents evidencing copyright registrations or independent creation, demonstrate that Defendants did not copy Star Fabrics' purportedly copyrighted work.

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“Subject Design”Allegedly Infringing Design

As these images demonstrate, although the two designs contain similar elements, the arrangement of those elements is significantly different. The overall look and feel of the designs is so different that any jury is unlikely to conclude that there was copying or that these designs are “substantially similar.” Some specific differences include: (1) Meetu’s design clearly does not have thin white lines running through the otherwise solid black ovals, as shown in the close-up images depicted in the Complaint; (2) Meetu’s dress shows that its large black ovals are surrounded by a thick white border, which does not exist in Plaintiff’s Subject Design; and (3) Meetu’s design includes large black circles, inside of which are black and white shapes configured in a diamond pattern, but these are absent from Plaintiff’s design. These are but a few of the many differences between the two designs. So in addition to the critical fact that Plaintiff has provided no evidence of copying or any defendant’s access to Plaintiff’s design, the parties’ designs provide evidence that no such copying occurred.

1 Because Plaintiff cannot prove the second element of its infringement claim, that
2 Defendants copied its copyrighted work, summary judgment should be granted.

3 **3. Denying this motion would prejudice Defendants.**

4 Having not received any evidence from Plaintiff during discovery, Defendants
5 cannot evaluate any documents or testimony that Plaintiff would seek to offer at trial,
6 which prohibits Defendants from mounting a proper defense. Furthermore, even if all
7 documents responsive to Defendants' requests were produced immediately, and
8 Plaintiff offered witnesses for depositions in the very near future, with the April 18,
9 2017 trial date only two months away, Defendants would have insufficient time to fully
10 analyze the evidence and prepare for trial. Requiring Defendants to proceed to trial in
11 the absence of evidence would prejudice and cause irreparable harm to Defendants.
12 The case should therefore be dismissed for failure to prosecute, and Defendants'
13 summary judgment motion should be granted.

14
15 **V. CONCLUSION**

16 Defendants respectfully request that the Court dismiss this case for Plaintiff's
17 failure to prosecute and grant summary judgment, because: (a) Plaintiff failed to
18 provide evidence of authorship or ownership of the Subject Design during the discovery
19 period and therefore can provide no such evidence at trial; (b) Plaintiff has failed to
20 provide evidence that any Defendant had access to the Subject Design and therefore can
21 provide no such evidence at trial; and (c) the designs at issue are substantially
22 dissimilar.

1 Dated: February 13, 2017

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Attorneys for Defendants Burlington Coat
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